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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAYMOND RICHARDS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

WHETHER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES A WARRANT IN ORDER TO CONDUCT A SEARCH OF INTERNATIONAL MAIL THAT HAS BEEN DELIVERED TO THE ADDRESSEE PRIOR TO THE SEARCH OF THE MAIL?

WHETHER A DRUG ENFORCEMENT ADMINISTRATION AGENT HAS THE AUTHORITY TO CONDUCT A WARRANTLESS BORDER SEARCH IN THE ABSENCE OF SPECIFIC CONGRESSIONAL DELEGATION TO THE DRUG ENFORCEMENT ADMINISTRATION?

LIST OF INTERESTED PARTIES

The only persons having an interest in this case are the Petitioner, his family, and the United States of America.

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Petitioner, RAYMOND RICHARDS, respectfully prays that a Writ of Certiorari issue to review the judgment, opinion, and order on rehearing of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 2, 1981, and June 1, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix attached hereto and is reported as *United States* v. *Richards,* 638 F.2d 765 (5th Cir. 1981). The majority opinion was authorized by Circuit Judge Rubin, in which Judge Gee concurred and filed a separate opinion. Chief Judge Godbold dissented from the majority in a written opinion. The appellate court denied a petition for rehearing and petition for rehearing en banc in a per curiam order entered June 1, 1981. This ruling is also reproduced in the Appendix and can be found at 646 F.2d 962.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 2, 1981. A timely petition for rehearing and petition for rehearing en banc was denied in a brief per curiam opinion on June 1, 1981. The appellate court then entered an order staying issuance of the mandate pending the timely filing of a certiorari petition and disposition thereof by this Court. This petition is filed within the authorized time period. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

19 U.S.C. § 482:

> Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law, and if any such officer

or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

19 U.S.C. § 1582:

The Secretary of the Treasury may prescribe regulations for the search of persons and baggage and he is authorized to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.

21 U.S.C. § 878:

Any officer or employee of the Drug Enforcement Administration designated by the Attorney General may—

(1) carry firearms;

(2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpenas, and summonses issued under the authority of the United States;

(3) make arrests without warrant (A) for any offense against the United States committed in his presence or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;

(4) make seizures of property pursuant to the provisions of this subchapter; and

(5) perform such other law enforcement duties as the Attorney General may designate.

STATEMENT OF THE CASE

On December 5, 1977, RAYMOND RICHARDS, an airline steward stationed at the Miami International Airport, applied for a post office box at the Miami Springs, Florida, post office, which was located near the airport. He designated the boxholder as Mehling Arts & Crafts, furnished identification showing that he was Christopher Thompson, and signed the application in that name. The application was approved, and a box asasigned to Mehling was opened for use on December 15, 1977 (T 67).

On March 2, 1978, a sealed parcel addressed to Mehling Arts & Crafts at the Miami Springs box number arrived at the Foreign Mail Center in New York. The customs declaration stated that the package contained Thai silk and uncut stones. The parcel was opened and inspected by William Graham, an employee of the United States Customs Service, who found ten cigarette packages inside. Mr. Graham initially inspected the package because he was suspicious of its contents. He opened one of these, found cigarettes, and sent the parcel to another officer for further inspection because it appeared to contain a tobacco product. The second officer opened two more cigarette packages; each contained vials of material that on field test was found to be heroin. (T 128-129, 156). Neither the amount of heroin nor its strength was established in New York.

The parcel was reassembled, resealed and forwarded to the postal inspector in Miami in a locked pouch for controlled delivery. Postal Inspector Madux delivered the package to the Miami Springs post office on March 13, 1978, with instructions to put a notice of arrival in the Mehling box. A postal employee testified that she had never seen mail in the Mehling box until this pack-

age arrived. Drug Enforcement Administration agents set up surveillance of the box and waited for someone to claim the parcel. (T 162-163, 167, 173).

RICHARDS arrived thereafter, received the notice, and asked for the package. There was a slight delay because he had no identification showing a connection with Mehling, but the package was nevertheless given to him. Drug Enforcement Administration agents watched RICHARDS take the package. They continued to observe him as he walked out of the building, down a side street, and into a parking lot behind the post office. The agents exercised care to assure that RICHARDS had no opportunity to leave the scene with the parcel. They arrested him as he entered his car. The agents addressed him as Christopher Thompson and he responded by giving his correct name. The agents gave RICHARDS *Miranda* warnings and asked him why he had picked up the package. He replied by asking the agents what was in the parcel. When they told him it contained narcotics, RICHARDS said he knew nothing about it. He explained that someone had telephoned him, asked him to pick up the package, and promised to pay him for doing so. (T 90-104).

The DEA agents took RICHARDS to a police facility several blocks away. He was processed for booking and placed in a holding cell. While there, the sealed package was opened without a warrant outside of RICHARDS' presence. Its contents were later analyzed by a chemist who found 27.4 grams of 93% heroin hydrochloride, which when cut would produce 12,000 street level doses. (T 58, 93-94, 98-99).

RICHARDS was indicted for possession of heroin with intent to distribute it, in violation of 21 U.S.C. § 841

(a)(1). At his trial, he testified that he operated a mail order business importing and selling uncut gems and maintained a postal box at the Miami post office in connection with that business. RICHARDS stated that he had recently started Mehling Arts & Crafts as a mail order export-import business and needed a separate post office box for it, but none was available at the Miami post office. He used a false name to apply for the Miami Springs box because he feared that operating two outside enterprises might jeopardize his job as a steward. A personnel administrator for the airline testified that it was permissible for employees to have outside jobs and that many held other jobs, but he acknowledged that in some circumstances outside employment might have an adverse effect on an employee's job. (T 201-203, 229).

RAYMOND RICHARDS was found guilty by a jury of possession of heroin with intent to distribute it, and sentenced to seven (7) years imprisonment followed by a five (5) year special parole term. (R 421, 442). RICHARDS appealed his conviction to the Fifth Circuit Court of Appeals, raising two issues as grounds for reversal, towit: (1) the propriety of the warrantless search of the parcel by DEA agents after it had been delivered to RICHARDS; and (2) the insufficiency of the evidence to support the conviction for possession with intent to distribute heroin. The Fifth Circuit addressed both issues in its written opinion. 638 F.2d 765. Regarding the search and seizure question, the majority, writing through Judge Rubin, held that the search was reasonable:

> [W]e apply this circuit's extended border search doctrine to searches of mail and conclude that such a warrantless search is reasonable (a) when it is established by a preponderance of the evidence

> that the mail has crossed the border; (b) when it appears with reasonable certainty that the mail's contents have not been altered since it entered the United States and, (c) if the search occurs after delivery of the mail to the addressee, when the government agents who made the search had a reasonable suspicion of smuggling activity. While these requisites have not been exacted in every Fifth Circuit extended-border-search decision, and while, even in those of our decisions requiring them, each has not been separately set forth with this specificity, each of them has been implicitly or explicitly demanded in many of our prior decisions. Thus summarized, they are distillate of a variety of decisions. Each of them has been satisfied here.

Id. at 733 (footnote omitted).

Circuit Judge Gee, concurring in the majority opinion, filed a special concurrence, in which he offered two additional reasons for upholding the warrantless search and seizure. First, Judge Gee suggested that the "plain view" exception to the warrant requirement should control where law enforcement officers have effected a valid initial search of a package containing contraband which is then resealed and delivered to an individual under controlled supervision, and thereafter subjected to a second warrantless opening. In addition, Judge Gee stated that

> where an initial intrusion into a container has taken place—one not prohibited by the fourth amendment—and has disclosed the presence in it of contraband, and where the container remains under surveillance, a second intrusion made by governments agents who know the results of the initial search is not proscribed by the fourth amendment.

638 F.2d at 774.

The third member of the panel, Circuit Judge Godbold, authored a reasoned dissent in which he vehemently articulated that once a mailed parcel has been delivered to its addressee, the Fourth Amendment's warrant requirement is essential to justify a search of the package:

> . . . I would draw a bright, sharp line between mail that remains undelivered in the hands of or under the control of the mail service and mail that has been delivered to the addressee. For sealed mail that has been delivered I would require the usual probable cause and exigent circumstances to support a warrantless search. Sealed mail has several qualities that cause me to reach this decision.

638 F.2d at 774.

On rehearing, it was pointed out to the Court that the basis for the panel's opinion—that a valid border search occurred—was negated by the fact that agents of the DEA, and not the Customs Service, conducted the search. Because the DEA has no authority to conduct warrantless extended border searches, the border search doctrine could not be used to justify the governmental intrusion. The Fifth Circuit denied the rehearing request. Chief Judge Godbold again dissented from the majority action. 646 F.2d 962.

REASONS FOR GRANTING THE WRIT

I. The Fourth Amendment to the United States Constitution Requires the Obtaining of a Warrant in Order to Justify the Search of Sealed Mail That Has Been Delivered to the Addressee; a Warrantless Search Is Permissible Only Where Probable Cause and Exigent Circumstances Are Present.

On the basis of this Court's opinions in *Walter* v. *United States*, —— U.S. ——, 100 S.Ct. 2395 (1980),

Arkansas v. *Sanders*, 442 U.S. 753, 99 S.Ct. 2586 (1979), and *United States* v. *Chadwick*, 433 U.S. 1, 97 S.Ct. 2476 (1977), as well as decisions of other appellate courts, Petitioner maintains that the Fifth Circuit Court of Appeals has erroneously concluded that recipients of international mail have absolutely no right of privacy and freedom from governmental intrusion in the context of a law enforcement search and seizure of mail after delivery to the addressee. Petitioner further maintains that the Fourth Amendment to the United States Constitution mandates the presence of a warrant to search the contents of mail after delivery unless the existence of exigent circumstances prevents the timely application for a warrant.

A majority of the Fifth Circuit Court of Appeals held in this case that the seizure by agents of the United States Customs Service before delivery of a mailed package found to contain heroin was valid, as was the subsequent warrantless reopening of the parcel at the police station by representatives of the Drug Enforcement Administration after delivery to the addressee. Chief Judge Godbold dissented from the panel opinion, being of the view that once mail has been delivered to and is in the hands of the addressee, a warrant to search the package is required unless the presence of exigent circumstances prevents law enforcement officers from obtaining the necessary authorization.

It is submitted that the Fifth Circuit's holding involves a very substantial question of law which impacts on the everyday activities of government agents and persons entitled to the protection of our Constitution. The decision sought to be reviewed by this Court is a very narrowly defined one: whether foreign mail that

has been delivered to an addressee within the United States may be seized, opened, and searched without a warrant, provided that (1) there is a reasonable suspicion, supported by articulable facts, that the item searched contained contraband [1] and (2) it is established with reasonable certainty that, when searched, the mail was in the same condition as when the border was crossed. Under the decision presented for review, it matters not whether the parcel was the subject of a prior valid "customs search" because such initial intrusion goes merely to the degree of suspicion that the parcel contains contraband. Petitioner submits that this is a question of sufficient importance to warrant review by this Court.

This question now raised in this petition is presently pending before the Court on a certiorari petition to the Court of Appeal of the State of California, Fifth Appellate District, in *California* v. *Riegler*, Case No. 80-1421, 29 Crim. Law 4012. In the *Riegler* decision, however, that Court reached what this Petitioner maintains is the correct result, namely that a recipient of a package containing contraband sent through the international mails has a reasonable expectation of privacy in that parcel after receipt even though the item may have been previously subjected to a lawful Customs search and delivered under controlled circumstances and constant surveillance. *People* v. *Riegler*, 111 Cal. App. 3d 580, 168 Cal. Rptr. 816 (1980). As recognized by Mr. Justice Rehnquist on an application for stay of

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[1] In the present case, law enforcement officers had abundant probable cause to believe that the parcel contained contraband due to its prior search at the Foreign Mail Center in New York. 638 F.2d at 773.

the California judgment, the *Riegler* issue, which is identical to that involved in the present case,

> presents important issues regarding the level of expectation of privacy a recipient of a package containing contraband sent through the international mails may have when the packages have been previously subjected to a *lawful* Customs search and delivered under controlled conditions and constant surveillance. None of our prior cases have directly addressed this oft recurring situation and certainly none of the three opinions in *Walter* v. *United States* provides a ready answer. In my opinion, the case presents issues which are of sufficient importance that four Justices of this Court would likely vote to grant the State's petition for certiorari.

California v. *Riegler*, —— U.S. ——, 101 S.Ct. 832, 834-835 (1981).

Petitioner has no disagreement with the fact that warrantless Customs searches of letters and parcels sent through the international mails are permissible when conducted without delay at the border. *United States* v. *Ramsey*, 431 U.S. 606, 615, 97 S.Ct. 1972, 1978 (1977). The rationale behind this rule of law is simply that the government's interest in protecting the integrity of its borders is sufficiently strong so as to justify said searches on reasonableness grounds. *Id.* at 616-617, 97 S.Ct. at 1978-1979; *Carroll* v. *United States*, 267 U.S. 132, 153-154, 45 S.Ct. 280, 285 (1925). This is not to say, however, that once the mail has passed through the Customs process and is in the hands of its ultimate recipient, the same government interest is involved. Indeed, the Government's paramount protective concern is greatly reduced at that juncture, while the individu-

al's privacy interest becomes exceedingly strong and legitimate once the mail is reduced to his possession. Our Constitution demands that careful scrutiny be paid to such intrusions. In the present case, the individual's privacy rights were discarded without sufficient cause.

Sealed mail which has been delivered to its addressee has several unique qualities which mandate judicial intervention prior to governmental intrusion therein. Delivered mail is essentially private, and is often the repository of confidential correspondence, intimate gifts, and closely guarded secrets. Permitting uncontrolled entry into this most private of all property is an unparalleled affront to one's ordinary notions of privacy.

Perhaps even more important than one's historical concepts of personal rights in mail is the fact that where a package is sealed and the contents hidden from public view, there is an objective expectation of privacy that is accepted by society in general. This was the very point recognized in *United States* v. *Chadwick,* 433 U.S. 1, 11, 97 S.Ct. 2476, 2483 (1977):

> By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against the intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause.

The objective evidence in the present case shows that the parcel, when received by Petitioner, was wrapped and sealed precisely as it had been prior to the Customs

search, ostensibly in an effort to not alert the recipient that the package had been opened. The parcel had no outer labels or markings which indicated the character of its contents. As this Court stated in *Walter* v. *United States*, —— U.S. ——, 100 S.Ct. 2395, 2402 n.12 (1980) (per Stevens, J.):

> . . . it is difficult to understand how petitioners' subjective expectation of privacy could have been altered in any way by the subsequent events of which they were unaware.

Due in part to the Government's act of fostering an expectation of privacy by rewrapping and resealing the parcel, there was a legitimate expectation that when the package arrived at the Miami Springs address and was picked up, its contents would remain private. The partial invasion of privacy by the Customs Service did not, and could not, automatically justify a total, complete, and recurring invasion. Again, the language in *Walter* v. *United States, supra* at 2403, is pertinent:

> It did not simply strip the remaining unfrustrated portion of [the] expectation of all Fourth Amendment protection. (footnote omitted).

Because sealed items in the mail historically have been considered to have a high degree of privacy, government intrusion into such parcels has met with frequent Fourth Amendment criticism. *United States* v. *Van Leeuwen*, 397 U.S. 249, 90 S.Ct. 1029 (1970); *Ex parte Jackson*, 96 U.S. 727 (1878). That criticism is particularly real in the present case, where the expectation of privacy possessed by Petitioner is, under all

the circumstances, reasonable and justified.[2] Moreover, there has never been any showing in this case that judicial intervention in the form of reviewing a request for a search warrant posed any serious problem.

At the time of the DEA search, Petitioner was in lawful possession of the mailed parcel. The package, while admittedly under continuous surveillance by Government agents, had been turned over to the custody of Petitioner. Although it is not questioned that an initial search of the package was proper it was in the lawful possession of the Government, it is incredible to assume, as the lower tribunal did, that once seized, property is forever after subject to a further search even when it is returned to its rightful recipient.

There is little doubt that the concept of a continuous right to search is not a valid rule of law, if ever it was. This Court has recognized that where an individual has a legitimate expectation of privacy in a piece of property,[3] as delineated in *Rawlings* v. *Kentucky*, —— U.S. ——, 100 S.Ct. 2556 (1980), and *Rakas* v. *Illinois*, 439 U.S. 128, 99 S.Ct. 421 (1978), law enforcement officers cannot conduct warrantless searches thereof unless the exigencies of the situation demand such. *United States* v. *Chadwick, supra; Arkansas* v. *Sanders*, 442 U.S. 753, 99 S.Ct. 2586 (1979) (in the absence of exigent circumstances, even though police had probable cause to

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[2] It is noteworthy that the majority opinion of Judge Rubin expressly finds that RICHARDS "had a legitimate expectation that the contents of the package were private . . ." 638 F.2d at 770. The Court's ultimate approbation of the law enforcement conduct was due to application of the extended border search doctrine.

[3] As recognized in note 2, *supra*, all members of the Fifth Circuit panel agreed that RICHARDS possessed a legitimate expectation of privacy.

search a suitcase for marijuana after seizing it from the trunk of a taxicab in which the accused was a passenger, they could not search it without first obtaining a warrant). Appellate courts have recognized this principle in numerous decisions which declare unconstitutional warrantless searches of private property after seizure by the Government. *United States* v. *Rigales,* 630 F.2d 364 (5th Cir. 1980); *United States* v. *Rengifo-Castro,* 620 F.2d 230 (10th Cir. 1980); *United States* v. *Calandrella,* 605 F.2d 236 (6th Cir.), *cert. denied,* 444 U.S. 991, 100 S.Ct. 522 (1979) (agents had no right to search seized briefcase once it was reduced to their exclusive control); *United States* v. *Schleis,* 582 F.2d 1166 (8th Cir. 1978). The search in question took place herein only after Petitioner had been taken to a police station and questioned. This was at least one hour after Petitioner picked up the mailed parcel. Consequently, the lower tribunal's apparent approval of a continuing right to search a parcel of mail without a warrant is an erroneous rule of law which runs afoul of this Court's pronouncements on the subject.

Petitioner further submits that the "extended border search" rationale utilized by the Fifth Circuit is erroneous and warrants review by this Court. There is no general authority to make a warrantless search of sealed mail that is in the interior of this country and in the hands of the addressee. *See United States* v. *King,* 517 F.2d 350, 354 (5th Cir. 1975), *cert. denied,* —— U.S. ——, 100 S.Ct. 2943 (1980) (search of international mail at inland post office prior to delivery to addressee is permissible because mail was still in the process of being delivered). Such a search is no more a product of the Government's interest in policing its borders than an inland search of an automobile would be. This is precisely the rationale of the decision in

Almeida-Sanchez v. *United States,* 413 U.S. 266, 93 S.Ct. 2535 (1973), which held that a warrantless search of a motor vehicle situated on a road within the United States at least twenty miles from the Mexican border without probable cause of consent violates the Fourth Amendment. *See also United States* v. *Ortiz,* 422 U.S. 891, 95 S.Ct. 2585 (1975) (searches at traffic points away from border do not qualify as border searches). In the instant case it simply cannot be maintained that a package which is processed by Customs in New York is subject to a "border search" after its delivery to a Miami Springs addressee some eleven days later. Quite clearly, when the mail was delivered to its ultimate destination, Governmental responsibility over that package ended, as did the Government's ability to intrude without judicial authorization. *See United States* v. *Anton,* 547 F.2d 493 (9th Cir. 1976) (once item is delivered to addressee, it ceases to be in the mail); *United States* v. *Davis,* 461 F.2d 83 (5th Cir.), *cert. denied,* 409 U.S. 921 (1972) (under theft of mail statute, the authority of the Postal Service over mail ends with delivery to addressee).

The extended border search doctrine has been the subject of repeated analysis by appellate courts. Those examinations, however, do not suggest that the doctrine is applicable to the present circumstances. Most recently, the Fifth Circuit, in *United States* v. *Ramos,* 645 F.2d 318 (5th Cir. 1981), conducted a detailed review of extended border searches within the context of an approach of an individual by *Customs* officials at the Miami International Airport some thirty minutes after that individual had departed from the Customs enclosure. The accused had gone to the hotel located at the airport, but there was no indication that he had checked into his room. The Court held on such facts

that because the individual was not significantly removed physically or temporarily from the border and had not been "assimilated into the mainstream of domestic activities", he was not shielded from appropriate border examinations and searches. *Id.* at 320-321.

Manifestly, the circumstances in this case pale by comparison to the rule of law utilized in *Ramos* and other extended border cases. *E.g., United States* v. *Walters,* 591 F.2d 1195 (5th Cir.), *cert. denied,* 442 U.S. 945 (1979); *United States* v. *Fogelman,* 586 F.2d 337 (5th Cir. 1979). Petitioner's parcel had been thoroughly processed at the border almost two weeks before the search at issue herein. Moreover, that search occured more than one thousand miles from where the package crossed the border. Finally, it was within the possession of RAYMOND RICHARDS, an individual who had absolutely no contact with any border and was, without question, an individual fully assimilated into the mainstream of domestic activities. Because the Fourth Amendment protects people and not places, *United States* v. *Salvucci,* —— U.S. ——, 100 S.Ct. 2547 (1980); *United States* v. *Payner,* —— U.S. ——, 100 S.Ct. 2439 (1980), the lower tribunal severely erred in attempting to validate the search at issue herein as a border search when the person from whom the property was taken could not himself have been the subject of any border search, no matter how minimally intrusive.

The Fifth Circuit's ruling in this case constitutes a dangerous expansion of pervasive governmental intrusion while needlessly reducing an individual's reasonable reliance on the Fourth Amendment's protection against unreasonable searches and seizures. A war-

rantless search must be "strictly circumscribed by the exigencies which justify its initiation." *Mincey* v. *Arizona*, 437 U.S. 385, 393, 98 S.Ct. 2408, 2413 (1978). No exigencies are present which could possible justify the intrusion initiated by DEA agents in this case. The opinion sought to be reviewed is neither legally sound nor practically sensible. Besides erroneously applying the law announced by this Court in the cited cases, the opinion further fashions an unworkable and unreasonable rule which will cause confusion to members of the law enforcement community. A review of this decision should convince this Court that a "bright line" standard is necessary which permits warrantless searches and seizures of mail still in possession of government authorities but requires warrants whenever the mail has been delivered to and is in the possession of the addressee, unless exigent circumstances absolutely prevent the obtaining of a warrant. This standard would free law enforcement officers of unwarranted confusion and technical analysis implicit in a determination of whether an "extended border search" is permissible in a given case, which is precisely the situation now confronting those officials. A more workable rule, which recognizes the competing interests and achieves the necessary constitutional balance, is in order.

II. A Drug Enforcement Administration Agent, in the Absence of Specific Congressional Delegation, Has No Authority To Conduct a Warrantless Seizure and Search Under the Guise of the Border Search Doctrine, Particularly Where the Property Subject to the Search Was Physically and Temporally Distant From the Border Crossing.

The Fifth Circuit's opinion in this case validated a warrantless extended border search conducted by agents of the Drug Enforcement Administration de-

spite the fact that the DEA has absolutely no statutory authority to participate in border searches or police this nation's boundaries, as do members of the United States Customs Service. There is no doubt that *Customs* is authorized to examine international mail entering the United States, under the border search theory. 19 U.S.C. §§ 482 1582; 19 C.F.R. §§ 145.2, 145.3. The same cannot be said, however, of agents in the Drug Enforcement Administration, whose authority is defined by 21 U.S.C. § 878. That DEA agents conducted an ultra vires exercise in an area over which they have no control deals a shattering blow to the opinion of the Fifth Circuit that a valid border search was conducted.

Appellate courts have recognized that powers of government agencies and express statutory delegations of authority are not freely exchangeable so as to be exercised at the discretion or whim of a particular official. For example, in *United States* v. *Thompson*, 475 F.2d 1359 (5th Cir. 1973), the Court discussed the authority of border patrol officers of the Immigration and Naturalization Service (INS) to conduct Customs border searches for contraband. The Court first noted that the authority and power of particular investigative officers must necessarily be identified by congressional mandate. Border patrol agents of the INS are authorized to search vehicles in which it is believed aliens are being brought into the United States, but have no power under immigration laws to search items and property too small to conceal aliens. *See, e.g., Roa-Rodriguez* v. *United States*, 410 F.2d 1206 (5th Cir. 1969). Nevertheless, by a series of proper delegations, border patrol officers have been designated by the Treasury Secretary as Customs agents having the ability to conduct border searches. 19 U.S.C. § 1401(i).

Consequently, a border patrol officer can validly act simultaneously as a Customs agent. Given such express authority, the Fifth Circuit correctly concluded in *Thompson* that property seized by a border patrol officer in the course of a Customs border search was permissible. The result would have been very different had there been no authority to act as a Customs officer, as recognized by other courts.

This principle is present in the Ninth Circuit opinion of *United States* v. *Soto-Soto*, 598 F.2d 545 (9th Cir. 1979), which involved a single agent of the Federal Bureau of Investigation (FBI) who conducted a border search which resulted in the discovery of contraband. After canvassing the statutory provisions governing Customs border searches and examining the judicial decisions regarding those searches, the Ninth Circuit concluded that the FBI agent had neither express nor implied authority to conduct a Customs border search. Nor could the search be justified as a general law enforcement activity in the area of the border. The Court then quoted from its earlier decision in *Alexander* v. *United States*, 362 F.2d 379, 381 (9th Cir.), *cert. denied*, 385 U.S. 977, 87 S.Ct. 519 (1966):

> In conferring upon customs officers such broad authority, circumscribed only by Constitutional limitations of the Fourth Amendment, the *Congress has in effect declared that a search which would be 'unreasonable' within the meaning of the Fourth Amendment, if conducted by police officers in the ordinary case, would be a reasonable search if conducted by Customs officials in lawful pursuit of unlawful imports.* Judicial recognition of this distinction has given rise to the term 'border search,' in order to distinguish official searches which are reasonable because made solely in the

> enforcement of Customs laws from other official searches made in connection with general law enforcement. (emphasis added).

As a result, evidence seized by the FBI in violation of that defendant's constitutional rights was ordered suppressed.

The Fifth Circuit's failure to grasp this critical concept has resulted in a very serious conflict between the circuits. The DEA agents in the present case had *no* authority, either express or implied, to conduct a Customs border search. They were not acting in joint concert with agents properly entitled to perform that function. *United States* v. *Guillen-Linares,* 636 F.2d 78 (5th Cir. 1981) (remand ordered to determine whether Coast Guard boarded vessel as agents of the Customs Service). Only Congress, and not the courts, is empowered to vest authority in particular officers, agencies, and branches of government. Article II, Section 2, *United States Constitution.* The exercise of a police power authorized by Congress—here, the power to conduct border searches—cannot be constitutionally transferred from one agency to another.

Important statutory limitations which protect the balance between sovereign power and constitutional rights were violated in this case. Petitioner was grievously injured by reason of this violation. Statutory law was disregarded, and the Fifth Circuit failed to recognize this default in its haste to rule on an unnecessary constitutional issue. The remedy for this serious injustice is for this Court to mandate strict compliance with statutes authorizing the exercise of the police power. Only in this way will law enforcement agencies closely scrutinize their activities so as to en-

sure full use of only that authority delegated by Congress.

CONCLUSION

The decision of the Fifth Circuit Court of Appeals is a serious erosion of the rights most revered by people in a free society—to be free from unreasonable government intrusion into their private lives and possessions. The rule forged by the panel is needlessly broad, and serves only to grant law enforcement officers unbridled authority to inconvenience citizens and interfere with their personal property. The proper result in a case like this, which can only be crafted by this Court, is to declare a bright line between mail that remains undelivered and mail that is in the hands of the addressee. Such a rule would free law enforcement officers from technical rules concerning the permissible extension of a border search, matters which are admittedly difficult for the judiciary and which no doubt cause hopeless confusion to enforcement personnel. The privacy interests at stake here are legitimate and worthy of protection by this Court. Petitioner respectfully submits that a writ of certiorari should issue to review the decision of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

March 2, 1981.

No. 78-5728

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

RAYMOND RICHARDS, *Defendant-Appellant.*

Rehearing Denied June 1, 1981.

Before GODBOLD, Chief Judge, GEE and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Under the border search doctrine, federal agents may without a warrant inspect mail arriving in this nation from abroad. We here consider whether the foreign mail may be followed into the hands of its addressee and, immediately after delivery, be seized and searched without a warrant. Concluding that such a search is permitted by the border search rule when there has been continuous surveillance of the mail and reasonable suspicion that it contains contraband, we deny a motion to suppress the results of the search and affirm the conviction of the recipient for possession of heroin with intent to distribute it.

I. The Facts

On December 5, 1977, Raymond Richards, an airline steward stationed at the Miami International Airport, applied for a post office box at the Miami Springs, Florida post office, located near the airport. He designated the boxholder as Mehling Arts & Crafts, furnished identification

showing that he was Christopher Thompson and signed the application in that name. The application was approved and a box assigned to Mehling was opened for use on December 15.

On March 2, 1978, a sealed parcel addressed to Mehling Arts & Crafts at the Miami Springs box number arrived at the Foreign Mail Center in New York. The customs declaration stated that it contained Thai silk and uncut stones. The parcel was opened and inspected by a customs agent who found 10 cigarette packages. He opened one of these, found cigarettes and sent the parcel to another officer for further inspection because it appeared to contain a tobacco product. The second officer opened two more cigarette packages; each contained vials of material that on field test was found to be heroin. Neither the amount of heroin in the parcel nor its strength was established in New York.

The parcel was reassembled, resealed and sent to the postal inspector in Miami in a locked pouch for controlled delivery. Government agents delivered it to the Miami Springs post office on March 13 with instructions to put a notice of arrival in the Mehling box. A postal employee testified she had never seen mail in the Mehling box until this parcel arrived. Drug Enforcement Administration agents set up surveillance of the box and waited for someone to claim the parcel.

Richards arrived in a half hour or less, received the notice and asked for the package. There was a slight delay because he had no identification showing a connection with Mehling, but the package was given to him. Government agents watched Richards take the package. They continued to observe him as he walked out of the building, down a side street for a short distance and into a parking lot behind the post office. The agents exercised care to assure that he had no opportunity to leave the scene with the parcel. They arrested him just as, or just after, he entered his

car. The agents addressed Richards as Christopher Thompson and he responded by giving his correct name. The agents gave him *Miranda* warnings and asked him why he had picked up the package. He replied by asking the agents what was in the parcel. When they told him that it contained narcotics, Richards said he knew nothing about it. He explained that someone had telephoned him, asked him to pick up the package and promised to pay him for doing so.

The government agents took Richards to a police facility a few blocks away. He was fingerprinted, photographed, booked and placed in a holding cell. While he was there, the sealed parcel was opened without a warrant outside of his presence. Later its contents were analyzed by a chemist, who found 27.4 grams of 93% heroin hydrochloride. He estimated that, when "cut," it would produce 12,000 street level doses.

Richards was indicted for possession of heroin with the intent to distribute it, in violation of 21 U.S.C. § 841(a)(1). At his trial, he testified that he operated a mail order business importing and selling uncut gems and maintained a postal box at the Miami post office in connection with that business. According to his testimony, Richards had recently started Mehling Arts & Crafts as a mail order export-import business and needed a separate post office box for it, but none was available at the Miami post office. He testified that he used a false name to apply for the Miami Springs box because he feared that operating two outside enterprises might affect his job as a steward. A personnel administrator for the airline testified that it was permissible for the company's employees to have outside jobs and that many held other jobs, but he acknowledged that in some circumstances outside employment might have an adverse affect on an employee's job.

II. Sufficiency of the Evidence

To prove commission of the crime of possession of heroin with intent to distribute it, the government must establish three essential elements: (1) knowing (2) possession of heroin (3) with intent to distribute it. *United States v. Johnson*, 469 F.2d 973, 976 (5th Cir. 1972); *United States v. James*, 555 F.2d 992, 999 (D.C.Cir.1977). Richards contends the evidence was insufficient to prove either that he knew the parcel contained a controlled substance or that he had the intention of distributing it.

Our review of the jury verdict is limited to determining whether the trier of fact could reasonably conclude that the evidence excludes every reasonable hypothesis, except that of guilt. *United States v. Hawkins*, 614 F.2d 85, 87 (5th Cir.), *cert. denied*, 446 U.S. 955, 100 S.Ct. 2926, 64 L.Ed.2d 814 (1980), *United States v. Squella-Avendano*, 478 F.2d 433, 436 (5th Cir. 1973). The issue of guilt remains a question for the jury unless we conclude that the jury must necessarily have had a reasonable doubt. *United States v. Shaw*, 555 F.2d 1295, 1300 (5th Cir. 1977); *United States v. Warner*, 441 F.2d 821, 825 (5th Cir.), *cert. denied*, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971). The supporting evidence may be direct or circumstantial and we do not discriminate against sufficiently probative evidence because it is indirect. *Id.* at 825.

The evidence, examined in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704 (1942), establishes that: (1) Richards opened the post office box in a false name and had no convincing explanation for doing so; (2) no mail except the parcel containing heroin had come to the post office box in the three months during which it was rented; and (3) the excuse Richards advanced after he was arrested, that someone else had asked him to pick up the package, was in truth inculpatory and indicated guilty

knowledge because the package was addressed to his company and he had rented the box.

These facts are circumstantial evidence on the issue of knowledge. Because no one has a window to a man's mind, knowledge must often be proved by indirect evidence. *Johnson v. Wright*, 509 F.2d 828, 831 (5th Cir.), *cert. denied*, 423 U.S. 1014, 96 S.Ct. 445, 46 L.Ed.2d 384 (1975); *Jackson v. United States*, 330 F.2d 679, 681 (8th Cir.), *cert. denied*, 379 U.S. 855, 85 S.Ct. 105, 13 L.Ed.2d 58 (1964). The evidence was sufficient to permit the jury to infer that Richards knew from what he said and did that the package contained narcotics. *See also United States v. Squella-Avendano*, 478 F.2d 433 (5th Cir. 1973) (similar amount of evidence held sufficient).

Richards having indisputably possessed heroin when he was arrested, we are left only with the question whether the evidence was sufficient to support the jury's conclusion that he intended to distribute it. That intention may not be inferred from possession alone, for contraband may be destined for personal use, not distribution. However, the possession of a quantity of narcotics so large that it could not be used by the possessor alone justifies the conclusion that he had an inventory for distribution rather than personal consumption. *See United States v. Grayson*, 625 F.2d 66 (5th Cir. 1980); *United States v. Soto*, 591 F.2d 1091, 1103 (5th Cir.), *cert. denied*, 442 U.S. 930, 99 S.Ct. 2862, 61 L.Ed.2d 298 (1979); *United States v. Raffo*, 587 F.2d 199, 201 (5th Cir. 1979); *United States v. Johnson*, 469 F.2d 973, 977 (5th Cir. 1972). The jury was warranted in concluding that one who possessed 12,000 doses of heroin did not intend to use the supply merely for personal euphoria. If, therefore, the warrantless post-delivery search was constitutionally proper and the evidence derived from it was properly admitted, the essential elements of the crime were proved.

III. Search of the Package

Richards does not challenge the admissibility of evidence obtained from the initial search of the package in New York and the field test that first disclosed its contents. He stipulated that the package contained heroin when searched in New York and that the chain of custody between New York and Miami Springs was complete. Because the initial test did not establish the quantity of heroin in the package, however, the second search was crucial to proving his intent to distribute.

A. *Standing to Assert Fourth Amendment Rights*

The question of Richards' standing to contest the search was not raised in the court below. On appeal the government argued proleptically that the Supreme Court decision in *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), foretold the coming demise of the concept of "automatic standing" for possessory crimes. In *United States v. Salvucci*, —— U.S. ——, 100 S.Ct. 2547, 65 L.Ed. 2d 619 (1980), the Court followed the intimations of *Rakas v. Illinois*, 439 U.S. at 135 n.4, 99 S.Ct. at 426 n.4, 58 L.Ed. 2d at 396 n.4, and *Brown v. United States*, 411 U.S. 223, 229, 93 S.Ct. 1565, 1568-69, 36 L.Ed.2d 208, 214 (1973), and held that automatic standing does not justify the assertion of fourth amendment protection.

Fourth amendment protection is accorded only to a person who has a privacy interest in the area searched, *Rawlings v. Kentucky*, —— U.S. ——, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980), *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), a rubric adopted from a phrase used in *Katz v. United States*, 389 U.S. 347, 353, 88 S.Ct. 507, 512, 19 L.Ed.2d 576, 583 (1967). Instead of conducting a separate inquiry into standing, we now focus directly on whether the defendant possesses a legitimate expectation of privacy in the area searched. *Rawlings v. Kentucky*, —— U.S. ——, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980);

Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

The package was sealed and addressed to Mehling, which, in effect, was Richards. These facts alone indicate "an expectation that the contents would remain free from public examination." *United States v. Chadwick*, 433 U.S. 1, 11, 97 S.Ct. 2476, 2483, 53 L.Ed.2d 538, 548 (1977). *See generally Katz v. United States*, 389 U.S. at 352, 88 S.Ct. at 511-12, 19 L.Ed.2d at 582. Moreover, sealed mail historically has been considered to have a high degree of privacy, and government intrusion into mailed parcels is limited by the fourth amendment. *See United States v. Van Leeuwen*, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970); *Ex parte Jackson*, 96 U.S. 727, 24 L.Ed. 877 (1878).

Although the Supreme Court has rejected the importation into search and seizure law of arcane distinctions evolved in property law, *Rakas v. Illinois*, 439 U.S. at 149-50 n.17, 99 S.Ct. at 434, n. 17, 58 L.Ed.2d at 405 n.17, we note that Richards was in lawful possession of the package when it was seized. *Cf. Rakas v. Illinois*, 439 U.S. at 153, 99 S.Ct. at 435, 58 L.Ed.2d at 407 (Powell, J., concurring) ("property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable"). It is, therefore, not dispositive that Richards denied ownership of the package. Considering all the circumstances, we conclude that he had a legitimate expectation that the contents of the package were private,[1] and has standing to assert fourth amendment protection.

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[1] Because a defendant cannot challenge the search or seizure of abandoned property, *see United States v. Canady*, 615 F.2d 694 (5th Cir. 1980), *United States v. Anderson*, 500 F.2d 1311 (5th Cir. 1974), the government urges that Richards had abandoned the package. In the cases cited, however, the defendant had abandoned all claim to the property. In contrast, while Richards denied

B. *Border Search*

Under the fourth amendment, all warrantless searches and seizures are unreasonable except those conducted in a few narrowly defined situations where the circumstances justifying the search outweigh privacy rights. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *United States v. Sink*, 586 F.2d 1041 (5th Cir. 1978), *cert. denied*, 443 U.S. 912, 99 S.Ct. 3102, 61 L.Ed.2d 876 (1979). Because the fourth amendment expressly prohibits only unreasonable warrantless searches, it patently incorporates a balancing test, weighing in one measure the level of intrusion into individual privacy and in the other the public interest to be served. *United States v. Martinez-Fuerte*, 428 U.S. 543, 555, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116, 1126-1127 (1976); *United States v. Himmelwright*, 551 F.2d 991, 994 (5th Cir.) *cert. denied*, 434 U.S. 902, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977). Thus, a warrantless search is justified when it is incident to a lawful arrest, *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); when it is conducted with probable cause under exigent circumstances, *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); when it involves a vehicle, *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); or when it is made for administrative purposes to satisfy a special governmental need and necessity outweighs the invasion entailed, *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).

Warrantless searches may also be made at the border. These searches, undertaken pursuant to the historical right

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ownership of the package, he claimed he was picking it up for someone else. This amounted to assertion of a lawful possessory claim. While not alone sufficient to establish a legitimate expectation of privacy, the claim does demonstrate that Richards manifested no intention of abandoning the package that he held under his arm.

of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are deemed reasonable simply by virtue of the fact that they occur at the border. *United States v. Ramsey*, 431 U.S. 606. 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). This sovereign right was recognized by the First Congress, Act of July 31, 1789, ch. 5, 1 Stat. 29 (1789), and statutes exempting border searches from warrant and probable cause requirements have been in force in this country ever since.[2]

A border search need not take place at the actual border. It may be conducted at a place considered "the functional equivalent of the border," such as the port where a ship docks in this country after entering our territorial waters from abroad. *United States v. Prince*, 491 F.2d 655 (5th Cir. 1974), or the airport where an international flight lands, *United States v. Klein*, 592 F.2d 909 (5th Cir. 1979).

While the mere fact that a person or thing has once crossed the border does not sanction a search of it forever after, we have also recognized that the need to protect personality and property against warrantless invasion must be balanced against the myriad difficulties facing customs and immigration officials who are charged with the enforcement of smuggling and immigration laws. We have, therefore, recognized in the doctrine of "extended border search," the government's power, under certain circum-

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[2] *See* Barnett, A Report on Search and Seizure at the Border, 1 Am.Crim.L.Q. 36 (1963); 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 276 (1978). *See also* 19 U.S.C. § 1582; 19 C.F.R. § 145.2 ("All mail arriving from outside the Customs territory of the United States which is to be delivered within the Customs territory of the United Staes . . . is subject to customs examination"). *Cf.* 19 C.F.R. § 145.3 (sealed letter-class mail is authorized to be opened without a warrant only if the customs officials have reasonable cause to suspect the presence of merchandise other than correspondence).

stances, to search without a warrant persons and things after they have entered the country.[3]

Various panels of this court have described the requisites for a warrantless extended border search in terms that are not reconcilable. At its most permissive, the standard has been phrased as requiring only a "reasonable suspicion of a customs agent" if the search occurs in the "border area." *See, e.g., United States v. Hill*, 430 F.2d 129, 130-31 (5th Cir. 1970). We have also phrased the standard as requiring either "direct contact" or "nexus" with the border area coupled with a reasonable suspicion of secreted contraband. *See, e.g., United States v. Salinas*, 439 F.2d 376, 379 (5th Cir. 1971); *United States v. Bowman*, 502 F.2d 1215, 1219 (5th Cir. 1974).

On several occasions, however, this court has exacted stricter criteria and has required the government to show both a likelihood that the person or thing has crossed the border and reasonably certainty that any contraband discovered by the search was present when the border was crossed. *See, e.g., United States v. Fogelman*, 586 F.2d 337 (5th Cir. 1978); *United States v. Martinez*, 481 F.2d 214 (5th Cir. 1973), *cert. denieed*, 415 U.S. 931, 94 S.Ct. 1444, 39 L.Ed.2d 489 (1974). Because the primary justification

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[3] *See, e. g., United States v. Kenney*, 601 F.2d 211 (5th Cir. 1979). *United States v. Walters*, 591 F.2d 1195 (5th Cir.), *cert. denied*, 442 U.S. 945, 99 S.Ct. 2892, 61 L.Ed.2d 317 (1979); *United States v. Johnson*, 588 F.2d 147 (5th Cir. 1979); *United States v. Fogelman*, 586 F.2d 337 (5th Cir. 1978); *United States v. Ivey*, 546 F.2d 139 (5th Cir. 1977), *cert. denied*, 431 U.S. 943, 97 S.Ct. 2662, 53 L.Ed.2d 263 (1977); *United States v. Brom*, 542 F.2d 281 (5th Cir. 1976); *United States v. Brennan*, 538 F.2d 711 (5th Cir. 1976), *cert. denied*, 429 U.S. 1092, 97 S.Ct. 1104, 51 L.Ed.2d 538 (1977); *United States v. Bowman*, 502 F.2d 1215 (5th Cir. 1974); *United States v. Steinkoening*, 487 F.2d 225 (5th Cir. 1973); *United States v. Martinez*, 481 F.2d 214 (5th Cir. 1973), *cert. denied*, 415 U.S. 931, 94 S.Ct. 1444, 39 L.Ed.2d 489 (1974); *United States v. Salinas*, 439 F.2d 376 (5th Cir. 1971); *United States v. Hill*, 430 F.2d 129 (5th Cir. 1970).

for the relaxation of fourth amendment standards in these situations is the crossing of a border, these constraints are warranted and the less exacting standards of *Hill*, *Salinas*, and *Bowman* have been criticized. *See, e.g.*, Note, From Bags to Body Cavities: The Law of Border Search, 74 Colum.L.Rev. 53, 60-61 (1974); 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 298 (1978).

In *United States v. Johnson*, 588 F.2d 147 (5th Cir. 1979), this court rejected the bare requirement of "border nexus" as being inconsistent with the decision of the Supreme Court in *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1976), and held that "[a] search is not a valid border search unless it appears by a preponderance of the evidence, direct or circumstantial, that a border crossing has occurred." *United States v. Johnson*, 588 F.2d at 154 (footnote omitted).

The government must also be able to show, with reasonable certainty, that conditions remained unchanged from the time of the border crossing until the subsequent warrantless search. *United States v. Fogelman*, 586 F.2d 337, 343 (5th Cir. 1978); *Cf. United States v. Walters*, 591 F.2d 1195, 1198 (5th Cir. 1979) (extended border search doctrine, requiring unchanged conditions, applied to strip search). In other words, it must be established with reasonable certainty that, when searched, the person or thing was in the same condition as when the border was crossed. This requirement is usually met by proving either that the object searched was subject to constant surveillance from the time it crossed the border or that, under the circumstances, the contraband was not likely to have been introduced during any breaks in the surveillance. *See, e.g., United States v. Martinez*, 481 F.2d 214, 218-19 (5th Cir. 1973), *cert. denied*, 415 U.S. 931, 94 S.Ct. 1444, 39 L.Ed.2d 489 (1974) (35 minute break in surveillance held insufficient to establish changed circumstances in view of the fact that it took the authorities two hours to unload the 628

pounds of marijuana hidden in a secret compartment of a truck). Finally, before conducting a warrantless extended border search, the government agents must possess a reasonable suspicion, supported by articulable facts, that the person or thing searched is involved in illegal activity, such as smuggling contraband.[4] *United States v. Kennedy*, 601 F.2d 211, 213 (5th Cir. 1979); *United States v. Martinez*, 481 F.2d 214, 219 (5th Cir. 1973), *cert. denied*, 415 U.S. 931, 94 S.Ct. 1444, 39 L.Ed.2d 489 (1974).

There appears to be no sound reason to distinguish between incoming mail and other property that crosses our border. Affixing a postage stamp to a parcel should not grant it immunity that would not be accorded a package carried by a traveller.[5] In *United States v. Ramsey*, 431

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[4] This additional requirement, which is more than is required of a search conducted at the actual border, is exacted because extended border searches usually occur after an initial, routine search and, unlike those routine searches, may stigmatize the individual searched, are unexpected and involve a greater invasion of privacy.

[5] *See also Von Cotzhausen v. Nazro*, 107 U.S. 215, 2 S.Ct. 503, 27 L.Ed. 540 (1883). In *Von Cotzhausen* the Supreme Court upheld a warrantless seizure of a woolen scarf by a customs collector. Although the Court did not discuss the affect that the fourth amendment had upon the seizure, it did note carefully the adverse implications of distinguishing between mail and other modes of ingress:

> Of what avail would it be that every passenger, citizen and foreigner, without distinction of country or sex, is compelled to sign a declaration before landing, either that his trunks and satchels in hand contain nothing liable to duty, or, if they do, to state what it is, and even the person may be subjected to a rigid examination, if the mail is to be left unwatched, and all its sealed contents, *even after delivery to the person to whom addressed*, are to be exempt from seizure, though laces, jewels, and other dutiable matter of great value may thus be introduced from foreign countries.

Id. at 218, 2 S.Ct. at 505 (emphasis added).

U.S. 606, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977), the Supreme Court held that a search by custom officials of incoming international letter-class mail without a warrant was constitutionally permissible. While the Court reserved the question of the validity of such a search if conducted at a point distant from the border, 431 U.S. at 615 n.11, 97 S.Ct. at 1978, n.11, 52 L.Ed.2d at 626 n.11, it rejected the argument that mail should be treated differently from and receive more constitutional protection than incoming persons or vehicles: "It is clear that there is nothing in the rationale behind the border-search exception which suggests that the mode of entry will be critical." 431 U.S. at 620, 97 S.Ct. at 1980, 52 L.Ed.2d at 629. "The critical fact is that the envelopes cross the border and enter this country, not that they are brought in by some mode of transportation rather than another. It is their entry into this country from without it that makes a resulting search 'reasonable.' " 431 U.S. at 620, 97 S.Ct. at 1980-81, 52 L.Ed.2d at 629. The Court found no historical or constitutional reason for treating mail differently from persons or vehicles entering the country. *See also United States v. King*, 517 F.2d 350 (5th Cir. 1975), *cert. denied sub nom. Pearson v. United States*, 446 U.S. 966, 100 S.Ct. 2943, 64 L.Ed.2d 825 (1980) (approving a search of mail that was made prior to delivery to the addressee at an inland post office).

Extending the doctrine of *Ramsey* and *King*, we see no reason to prohibit to extended border search of international mail under the same conditions that would properly permit one to be made of persons or other property that has crossed the border. *See also United States v. Pringle*, 576 F.2d 1114, 1117 (5th Cir. 1978). There is no more reason to draw a bright line at the moment mail is delivered than there is to draw it after the incoming parcel crosses the border.

Thus, we apply this circuit's extended border search doctrine to searches of mail and conclude that such a warrant-

less search is reasonable (a) when it is established by a preponderance of the evidence that the mail has crossed the border; (b) when it appears with reasonable certainty that the mail's contents have not been altered since it entered the United States and, (c) if the search occurs after delivery of the mail to the addressee, when the government agents who made the search had a reasonable suspicion of smuggling activity. While these requisites have not been exacted in every Fifth Circuit extended-border-search decision, and while, even in those of our decisions requiring them, each has not been separately set forth with this specificity, eac hof them has been implicitly or explicitly demanded in many of our prior decisions. Thus summarized, they are distillate of a variety of decisions. Each of them has been satisfied here.[6]

The search was conducted with respect to a package that had undeniably crossed our international border and remained unchanged subsequent to that crossing. In addition, although reasonable suspicion is ordinarily sufficient to warrant such inland searches, even of mail, the government officials were certain that contraband was being smuggled in the package. Therefore, all the criteria that sanction

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[6] We note that in a similar fact situation the California Court of Appeal held that a warrant was required before the police could search, after delivery to the addressee, two packages that had been mailed from abroad. *People v. Riegler*, 111 Cal.App.3d 580, 168 Cal.Rptr. 816 (5th Dist. 1980). As a result of an earlier customs search, the packages were known to contain cocaine. The court rejected the arguments that the defendant had a decreased expectation of privacy in the packages because of the customs search and that the authorities were entitled to search the packages because the contents were known. Relying on another California decision, *People v. Whyte*, 90 Cal.App.3d 235, 152 Cal.Rptr. 280 (1979), the court reasoned that the act of delivery terminated the government's power to search the package without a warrant. The court did not, however, analyze the search under the extended border search doctrine that we adopt here.

warrantless border searches are met and we hold that the search was not unreasonable.[7]

Accordingly, the judgment of the district court is AFFIRMED.

GEE, Circuit Judge, concuring:

In my view there are at least two, and probably three, reasons why this "search" was valid. The first is well stated in Judge Rubin's opinion, in which I concur.

The second is that where, as here, an undisputedly valid initial search has established the presence of contraband in a container and the container remains under uninterrupted supervision and surveillance until delivery, a second opening of the container after delivery does not seem to me a search at all. What was in this package at the time Richards was apprehended with it was not suspected, was not believed with probable cause, but rather was *known*. The wrappings around it had no effect whatever to impeach that knowledge; in the circumstances of this case, they might as well have been absent or have been stamped "Grade A Indochinese Heroin." Where certain knowledge is present, as in the well-recognized "plain view" exception, I think it exalts form over susbtance to follow a *Chadwick*[1] analysis. Such an analysis is appropriate where probable cause is in play and where something remains to be discovered. Here it is true that the exact amount of heroin present was not known, but what was known was enough: that Richards stood before the agents holding contraband, and holding heroin at that—a susbtance illegal for private citizens to possess at any time and in any mount.

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[7] This decision, of course, does not sanction searching mail that has been delivered to the addressee and taken into his private possession beyond the scrutiny of government officials, with the concomitant possibility that the contents of the package had been altered.

[1] *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed. 2d 538 (1977).

Finally, and to whatever extent it may be distinct from the second reason given above, I believe that where an initial intrusion into a container has taken place—one not prohibited by the fourth amendment—and has disclosed the presence in it of contraband, and where the container remains under surveillance, a second intrusion made by government agents who know the results of the intial search is not proscribed by the fourth amendment. *United States v. McDaniel*, 574 F.2d 1224 (5th Cir. 1978); *United States v. Blanton*, 479 F.2d 327 (5th Cir. 1973) (both involving initial inspections by airline attendants seeking to discern the ownership of misrouted or unclaimed luggage).[2]

For all of the above reasons, I join in affirming the judgment of the court below.

GODBOLD, Chief Judge, dissenting:

The decision of the court is a narrow one: foreign mail that has been delivered to an addressee within the United States may be seized, opened and searched without a warrant, provided: (a) there is a reasonable suspicion, supported by articulable facts, that the item searched contains contraband;[1] (b) it is established with reasonable certainty that, when searched, the mail was in the same condition as when the border was crossed. Under the court's analysis, requirement (b) can be established by proof either that the mail was subject to constant surveillance from the time it crossed the border, or that under the circumstances no new

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[2] I recognize that the reasoning of these cases may be somewhat cast in doubt by *Walter and Sanders v. U. S.*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980); however, that result is unclear because of the want of a majority opinion and the reliance of Justice Stevens' plurality view on the screening of the obscene films, an additional step taken by the government agents that has no analogue in the circumstances of this case.

[1] The opinion by Judge Rubin, note 4, recognizes that this is a more stringent standard than required for a search of mail at the actual border.

contents were likely to have been introduced into the package during any breaks in the surveillance. The rationale for the majority view is "extended border search." No functional equivalent of the border is involved.

I do not differ with respect to requirement (b). Nor do I differ with requirement (a) as applicable to mail that has not been delivered to the addressee. But I would draw a bright, sharp line between mail that remains undelivered in the hands of or under the control of the mail service and mail that has been delivered to the addressee. For sealed mail that has been delivered I would require the usual probable cause and exigent circumstances to support a warrantless search. Sealed mail has several qualities that cause me to reach this decision.

First, the essentially private nature of mail is indisputable, we entrust important, confidential and intimate matters to our letters, and we ship gifts and other personal items in parcels, with the confidence that contents are private. Each of us is offended at the affrontery of any one who without permission opens our letters or our parcels. Almost every family of even minimal sophistication has been through the experience of teaching its children that mail, like a diary, is personal and intimate, not to be tampered with or scrutinized without authorization.

Second, the package that was seized and later searched was sealed and the contents hidden from public view. As the court stated in *U. S. v. Chadwick:*

> By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents should remain free from public examination. No less than one who locks the doors of his home against intruders, once who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause.

433 U.S. 1, 11, 97 S.Ct. 2476, 2483, 53 L.Ed.2d 538, 548 (1977). *See also Katz v. U. S.*, 389 U.S. 347, 352, 88 S.Ct. 507, 511-512, 19 L.Ed.2d 576, 582 (1967) The objective evidence shows that Richards sought to preserve his privacy in the package and took normal precautions to prevent its exposure to the public.

Third, sealed items in the mail historically have been considered to have a high degree of privacy, and government intrusion into such parcels has been perceived to be objectionable under the Fourth Amendment. *See U. S. v. Van Leeuwen*, 397 U.S. 249, 90 S.Ct. 1049, 25 L.Ed.2d 282 (1970); *Ex parte Jackson*, 96 U.S. 727, 24 L.Ed. 877 (1878). In short, Richards' expectation of privacy was legitimate in part because of the protection of mail under the Fourth Amendment. *Cf. Chadwick*, 433 U.S. at 7-11, 97 S.Ct. at 2481-2483, 53 L.Ed.2d at 545-48 (historical analysis of scope of Fourth Amendment).

Fourth, Richards was in lawful possession of the package. As Judge Rubin points out, the "arcane distinctions" of property law are not controlling but they are to be considered in determining whether expectations of privacy are reasonable. It seems to me that it is more of an affront to the citizen for the government to first seize from his possession an item essentially private with the purpose of searching it, and then to search it, than it is to search an item which without the necessity of seizure is in the rightful possession of the government and has never come into the citizen's possession.[2]

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[2] The double impact of seizure followed by search is demonstrated by cases like *Chadwick*, where is was permissible to invade privacy by a warrantless seizure but not by a warrantless search of the seized item. The argument that a valid seizure subsumes a right to search was rejected in *Chadwick*. In this case a seizure might have been justified on the ground of probable cause plus exigent circumstances but when one applies *Chadwick* the subsequent search of the sealed item is not justifiable. Faced with this situation, the government and the majority find their way to safe harbor by using "extended border search."

In general, mail crossing the international boundary is subject to border search the same as items entering by other modes of travel. *U. S. v. Ramsey*, 431 U.S. 606, 620, 97 S.Ct. 1972, 1980, 52 L.Ed.2d 617, 629 (1977). Incoming international mail may be searched in the interior of the country while it remains undelivered in the possession of the Postal Service. *U. S. v. King*, 517 F.2d 350, 354 (5th Cir. 1975); *U. S. v. Davis*, 461 F.2d 83, 89 (5th Cir.), *cert. denied* 409 U.S. 921, 93 S.Ct. 250, 34 L.Ed.2d 180 (1972) (under theft of mail statute authority of Postal Service over mail ends with delivery to proper addressee). The issue in *King* was whether a foreign letter received at San Francisco, not inspected, and routed to Birmingham, Alabama, could be opened for inspection without a warrant while still in possession of the mail service. We held that it could. The rationale was three-fold. First, since all incoming international mail is potentialy subject to search there is no reasonable expectation of privacy. Second, a search of mail that is in the possession of the Postal Service and has not been delivered takes place without knowledge of or inconvenience to the addressee. Third, search of mail prior to delivery is far less intrusive than searches of individuals or their immediate effects. None of these factors applies to mail that has reached the hands of the addressee.

The first *King* factor, the diminution in expectation of privacy by reason of the government's power to search, does not rest upon any change in the confidential and private nature of mail but in its exposure to a governmental power to inspect. The governmental power exists at the border and continues until delivery. But once mail is delivered to the addressee he is entitled to enjoy the expectation of privacy, free from governmental power to inspect, that inures from the nature of mail that has been placed in the hands of the person entitled to receive and retain it. There is no general authority to make a warrantless search of sealed mail that is in the interior of the country and is in the hands of the addressee. It is specious to find such

authority on the basis of the government's right to search mail that has never left its hands.

Looking to a second and third rationales of *King*, a search after delivery usually will occur with knowledge of and inconvenience to the addressee and in most cases will be more intrusive than a search prior to delivery and may be at a point distant from the place of delivery.[3] Allowing a search of mail after delivery to be justified as a border search greatly increases the potential for interfering with the rights of persons lawfully in the country. *See Carroll v. U.S.*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). As we have stated recently,

> Instead of drawing formalistic rules based on how long or how far a person has penetrated itno the country, we will continue to determine whether a search is at the border based on whether the rationale for border searches is vindicated without impinging the rights of persons "lawfully within the country . . ."

U.S. v. Walters, 591 F.2d 1195, 1198 (5th Cir.) (quoting *Carroll*), *cert. denied*, 442 U.S. 945, 99 S.Ct. 2892, 61 L.Ed. 2d 317 (1979).

The interests that the government seeks to vindicate in this case can be protected by less stringent procedures than the majority permit. Since the government can control time and place of delivery, it can secure a warrant to be served when delivery occurs. If this is not possible it may seize based upon probable cause and the exigency of the addressee's taking the item away, and then comply with *Chadwick*.

I respectfully dissent.

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[3] This case might well have come out differently if the interval between delivery and seizure had not been so transitory. It is the brevity of this time interval that causes this to be a hard case that makes bad law.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

June 1, 1981

No. 78-5728

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

RAYMOND RICHARDS, *Defendant-Appellant.*
Appeal from the United States District Court for the Southern District of Florida.

On Petition for Rehearing and Petition for Rehearing En Banc

(Opinion April 2, 1981, 5 Cir., 1981, 638 F.2d 765)

Before GODBOLD, Chief Judge, and GEE and RUBIN, Circuit Judges.

PER CURIAM:

In his application for rehearing, Richards questions the statutory authority of the DEA agents to make a warrantless extended border search. Whether the search was valid as a border search was an issue raised in the trial court, in the briefs filed in this Court and before the panel on oral argument. The district court, relying in part on the concept of border searches, upheld the warrantless search. Similarly, the panel opinion upheld the search as a valid extended border search. At no time before filing his application for rehearing did Richards question the statutory authority of the DEA agents to conduct a border search.

Generally, an appellate court does not consider issues raised for the first time on appeal. In the *Matter of Novak,* 639 F.2d 1274, 1276 (5th Cir. 1981). Moreover, absent ex-

ceptional circumstances we do not consider issues that are first presented in an application for rehearing. *Moore v. United States*, 598 F.2d 439 (5th Cir. 1979); *United States v. Sutherland*, 428 F.2d 1152, 1158 (1970), *appeal after remand*, 463 F.2d 641 (5th Cir.), *cert. denied*, 409 U.S. 1078, 93 S.Ct. 698, 34 L.Ed.2d 668 (1977) ("Having tried and appealed its case on one theory, an unsuccessful party may not then use a petition for rehearing as a device to test a new theory.") In light of the repeated opportunities to raise the issue of the statutory validity of the search and the nature of the claim, no exceptional circumstances are here presented.

Therefore, the petition for rehearing is DENIED.

GODBOLD, Chief Judge, dissents.